Supreme Court, U. S.
FILED
AUG 16 1976
MICHAEL RODAK, JR., CLE

IN THE SUPREME COURT OF

THE UNITED STATES

~~76-2301~~ .

UNITED STATES OF AMERICA,

Petitioner,

- against -

HOWARD P. GISKIN,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

Howard P. Giskin, petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on May 25, 1976.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 25, 1976. Petition for rehearing en banc was denied on July 23, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

I. Whether the contraband seized, pursuant to a search warrant, should be suppressed

where the affiant merely states that another agent obtained the information from an informant who had "demonstrated a pattern of reliability"; the informant is paid on a contingent fee basis, (contingent upon conviction) and the contingent fee arrangment is not made known to the Magistrate issuing the search warrant.

II. Whether this affidavit has sufficient factual basis to establish probable cause for the issuance of a search warrant.

CONSTITUTIONAL PROVISIONS INVOKED

1. The Fourth Amendment, United States Constitution.

STATEMENT

On August 29, 1975, a search warrant was issued out of the United States District Court for the Northern District of New York. Pursuant to the search warrant, the residence of the petitioner was searched and ten (10) ounces of a controlled substances were seized.

The search warrant was issued upon the affidavit of a Special Agent of the Drug Enforce-

ment Administration. The affiant stated that he believed that the contraband was concealed on the premises in question. The grounds for such information and belief were set forth in the following language:

> "From on or about the 7th day of May and continuously up to and including the date of the filing of this affidavit, in the Northern District of New York, Howard GISKIN et al and others unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate 21 USC 846; It was part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would manufacture illegally and possess with intent to distribute Schedule 1 controlled substance the exact amount thereof being unknown in violation of 21 USC 841 (a)1. In pursuance of the said conspiracy and to effect the objects thereof, on or about the 7th day of May 1975 in the Northern District of New York, a Howard Cooper representing Educational Research, P.O. Box 721, Saranac Lake, N.Y. placed an order of phenyl-2-propanone along with the laboratory equipment. That the contact telephone number for Howard Cooper is listed to Howard GISKIN, Herron Hill Road, Cannemora, N.Y. It is believed that P.O. Box 721, Saranac Lake, N.Y. and Literary Aids, Inc., Richmond, Vermont are subterfuge addresses used to order precursors to manufacture methamphetamine. That on July 28, 1975, at approximately 4 P.M. a informant who

> has demonstrated a pattern of reliability in the past was greeted at the front door of the GISKIN residence by an unknown male who had white flakes of an unknown substance scattered on his hair and beard. That the informant smelled a strong chemical odor which he described as a "putrified odor". On the evening of August 28, 1975, SA Benny T. Mangor learned from DEA Chemist Jack Fasanello that a putrified odor is indicative of amine free bases such as amphetamine or methamphetamine."

At the suppression hearing in the District Court, the following facts were brought out:

1) The informer did not communicate directly to the affiant, rather he communicated to another agent of the Drug Enforcement Administration and the agent then gave the information to the affiant;

2) The informant was a paid informant, payment being contingent upon conviction;

3) There was no evidence to show that the Magistrate was informed of the contingent fee arrangement at the time he issued the warrant, in fact, the evidence indicates that he was not so informed.

The District Court denied the motion to

suppress. Petitioner then pleaded guilty under the procedure outlined in U.S. v. Burks, 517 F2d 377 (Second Circuit, 1975) pending his appeal to the United States Court of Appeals, Second Circuit. The Court of Appeals held that the seized contraband should not be suppressed. A petition for a rehearing en banc was denied on July 23, 1976.

REASONS FOR GRANTING THE WRIT

In Spinelli v. United States, 393 U.S. 410 and Aguilar v. Texas, 378 U.S. 108, this Court held that an affidavit reciting information from an informant is insufficient to provide the basis for issuing a search warrant unless the affidavit (1) sets forth the underlying circumstances with sufficient specificity to enable the Magistrate to make an independent judgment concerning the validity of the informant's conclusion concerning the crime and (2) presents information to show that the informant is credible.

United States v. Harris, 403 U.S. 573 held an affidavit based on information given the

affiant by an informant who had actually purchased illicit whiskey from the defendant, when coupled with the affiant's own knowledge of the defendant's background, provided a sufficient basis for the issuance of a search warrant.

In this case, much of what the affiant states is based on mere belief or suspicion. The informant does not report any crime, merely some "white flakes" and a "putrified odor".

It is felt that such is not a sufficient factual basis for the issuance of a search warrant. The facts listed, even if true, do not establish probable cause. At best there is only evidence that might allow one to speculate that a crime is taking place.

We ask the Court to grant review in this case because it presents the important questions whether the contingent fee arrangement so diminished the credibility of the informant that the probable cause was not established and whether this Court will approve the actions of a federal

police force in withholding the fact of a contingent fee arrangement from the issuing magistrate.

Certainly, the fact that the informant was paid a fee contingent upon conviction bears heavily on his reliability. It is obvious that an informer in such a case might supply "information" based on mere gossip or speculation, yet allege that such was based on his own personal knowledge, perhaps even creating a story to show the supposed context in which he obtained the information.

In this case, the major basis for the search warrant was the information provided by the paid informant. There was not the bulk of information personally known to the affiant as was present in United States v. Harris, 403 U.S. 573. In such a case, the reliability and credibility of the informant is of extreme importance.

Although it is possible that probable cause might have been established had there been no contingent fee arrangement, it is submitted that

the officers of the federal police organization had an obligation to inform the magistrate of any facts which reasonably reflect on the informat's credibility.

The issue of probable cause should be determined by looking at the entire picture, not merely a one-sided and slanted viewpoint. It is patently obvious that probable cause can apparently be established, where none in fact exists, by giving the magistrate only a portion of the facts and withholding information which would be adverse to the issuance of the warrant.

The issue presented in this case is important, not only to the petitioner but to all those persons suspected by the police of possessing contraband. Law enforcement officers should be obligated to advise a magistrate of all reasonably pertinent facts bearing on the issuance of a search warrant, not merely a partial and lopsided version of the information.

It would seem that the only way to induce the police authorities to supply the information

to the magistrate is to suppress any evidence seized under a search warrant where the police have failed to act in good faith by withholding pertinent facts from the magistrate.

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Twenty-fifth day of May, one thousand nine hundred and seventy-six.

PRESENT:

HON. J. JOSEPH SMITH

HON. PAUL R. HAYS

HON. THOMAS J. MESKILL,

Circuit Judges,

UNITED STATES OF AMERICA, Appellee,	:	
V.	:	Docket No. 76-1073
HOWARD GISKIN, Appellant.	:	

Appeal from the United States District Court for the Northern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

The affidavit in support of the search warrant contained factual allegations sufficient to support the magistrate's conclusion that there was probable cause to believe that the manufacturing of controlled drugs was occurring illegally at the Giskin residence. The reliability of the prosecution's confidential informant was sufficiently established in the affidavit. Finally, the search warrant sufficiently described the premises to be searched.

Appellant's argument that the district court erred in denying motions in connection with a bill of particulars was waived by his plea of guilty. The length of the sentence imposed upon the appellant, being within the statute's permissible limits, is not subject to review.

/s/ J. Joseph Smith
J. JOSEPH SMITH

/s/ Paul R. Hays
PAUL R. HAYS

/s/ Thomas J. Meskill
THOMAS J. MESKILL

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 23rd day of July, one thousand nine hundred and seventy-six.

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United States of America,

Plaintiff-Appellee,

v. 76-1073

Howard P. Giskin,

Defendant-Appellant.

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A petition for rehearing containing a suggestion that the action be reheared in banc having been filed herein by counsel for the appellant, Howard P. Giskin, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ Irving R. Kaufman
IRVING R. KAUFMAN
Chief Judge

ORDER OF THE UNITED STATES

DISTRICT COURT

No written decision was handed down by the United States District Court. The Motion to Suppress was denied orally from the bench.

CONSITUTIONAL PROVISIONS INVOLVED

THE FOURTH AMENDMENT,

UNITED STATES CONSTITUTION:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.